

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THE PINE CREEK VALLEY,
WATERSHED ASSOC., *et al.*,

Plaintiffs,

v.

THE UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Defendants,

NATIONAL ASSOCIATION OF
HOMEBUILDER'S and PENNSYLVANIA
BUILDER'S ASSOCIATION,

Intervenor-Defendants.

No. 5:14-cv-01478-EGS

**BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

As set forth in the United States Environmental Protection Agency, et al.'s (collectively, "EPA") pending Motion to Dismiss [Doc. No. 16] and Motion for Summary Judgment [Doc. No. 36], Pennsylvania's Act 41 does not constitute a "revised or new" water quality standard subject to mandatory EPA review under the Clean Water Act ("CWA") Section 303(c)(3), 33 U.S.C. § 1313(c)(3). Thus, Plaintiffs have failed to identify a nondiscretionary duty under the CWA that EPA has failed to perform, and the Court lacks subject matter jurisdiction over Plaintiffs' claims. *See* 33 U.S.C. § 1365(a)(2). EPA respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment and grant EPA's Motion to Dismiss, or, alternatively, EPA's Motion for Summary Judgment.

PROCEDURAL BACKGROUND

EPA previously moved to dismiss the Complaint [Doc. No. 1] under Federal Rules of Civil Procedure 12(b)(1) and (b)(6), asserting that Plaintiffs failed to state a claim upon which

relief can be granted, and that the Court lacks subject matter jurisdiction to hear Plaintiffs' claims. [Doc. No. 16]. Plaintiffs opposed EPA's motion based in part on the assertion that the Court would have to consider facts beyond the Complaint to determine if Act 41 is a revised or new water quality standard, and that discovery was needed. Pls.' Opp. Br. to EPA's Mot. to Dismiss [Doc. No. 19] at 2. On September 2, 2014, the Court held an initial pretrial conference, during which Plaintiffs acknowledged that this case turns on a pure question of law that may be resolved without discovery. *See* Order dated September 5, 2014 [Doc. No. 28]. Pursuant to the Court's scheduling order, the parties have filed motions for summary judgment.¹ Plaintiffs' arguments in support of their Motion for Summary Judgment are nearly identical to the arguments raised in response to EPA's still-pending Motion to Dismiss. Plaintiffs have not identified any disputed material facts that would preclude summary judgment. Indeed, the issues before the Court remain the same as presented in EPA's Motion to Dismiss.

ARGUMENT

I. Act 41 is Not a Revised or New Water Quality Standard.

Act 41 is not a "revised or new" water quality standard. It does not amend Pennsylvania's Clean Streams Law, nor does it override the applicable level of water quality protection under Pennsylvania's water quality standards, including antidegradation review.

Plaintiffs assert that Act 41 revises Pennsylvania's antidegradation policy because it "exempts on-lot septic systems from antidegradation review." Pls.' Mem. of Law in Supp. of Summ. J. Mot. [Doc. No. 33] ("Pls.' Br.") at 6. To the contrary, Act 41 does not revise or otherwise extinguish Pennsylvania's EPA-approved antidegradation policy for nonpoint sources

¹ Intervenor-Defendants the National Association of Homebuilders and Pennsylvania Builders Association filed a motion for summary judgment seeking the same relief as EPA. [Doc. No. 35]. While EPA concurs with the relief sought in Intervenor-Defendants' motion, it does not adopt the arguments made in support thereof.

such as on-lot sewage systems, which provides that the Pennsylvania Department of Environmental Protection (“PADEP”) must assure that “cost-effective and reasonable best management practices” (“BMPs”) are achieved.² 25 Pa. Code § 93.4c(b)(2). Rather, Act 41 establishes that the Sewage Facilities Act and its regulations identify the appropriate BMPs for on-lot sewage systems and those BMPs will satisfy Pennsylvania’s antidegradation policy. As such, Act 41 could perhaps be construed to have revised or amended the requirements under Pennsylvania’s Sewage Facilities Act and its regulations regarding the appropriate BMPs for a particular type of nonpoint source (on-lot sewage systems), but *not* Pennsylvania’s antidegradation policy itself.³ EPA does not have a mandatory duty under the CWA to review and approve states’ decisions regarding appropriate nonpoint source BMPs. Instead, the CWA gives the states discretion to determine to what extent, and how, they will control nonpoint sources of pollution to meet water quality standards. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1126 (9th Cir. 2002); *Am. Farm Bureau Fed’n v. EPA*, 984 F. Supp. 2d. 289, 296-97 (M.D. Pa. 2013).

Plaintiffs also erroneously assert that “Act 41 says that antidegradation [review] is not required as long as other sewage regulations are followed.” Pls.’ Br. at 9. Pennsylvania’s antidegradation policy for nonpoint sources, which is set forth in its Clean Streams Law’s

² Pennsylvania’s antidegradation policy is consistent with EPA’s regulation that requires states “shall assure that there shall be achieved . . . all cost-effective and reasonable best management practices for nonpoint source control.” 40 C.F.R. § 131.12(a)(2).

³ Plaintiffs state that Act 41 conflicts with a Sewage Facilities Act regulation requiring PADEP to evaluate on-lot sewage plans to determine whether they are consistent with Pennsylvania’s antidegradation requirements. Pls.’ Br. at 7 (citing 25 Pa. Code. 71.21(a)(5)(i)(E)). However, there is no dispute that Pennsylvania’s Sewage Facilities Act regulations are not themselves water quality standards. Thus, even if Act 41 conflicts with or revises a Sewage Facilities Act regulation, it does not revise Pennsylvania’s water quality standards and is not subject to mandatory EPA review under the CWA.

regulations, is still in effect. Act 41 merely states that on-lot sewage systems (a subset of nonpoint sources) satisfy Pennsylvania's antidegradation policy if they are designed and approved in accordance with the Sewage Facilities Act and its regulations.

II. EPA Has No Nondiscretionary Duty Under CWA Section 303(c) to Review State Laws or Regulations Regarding Nonpoint Source Pollution.

As set forth in detail in EPA's Motion to Dismiss and Motion for Summary Judgment, the CWA does not vest EPA with direct authority to review and approve or disapprove state requirements for nonpoint source pollution controls, including state decisions on how nonpoint sources of pollution will conform or maintain water quality standards in the receiving water bodies.⁴ See EPA's Mem. of Law in Supp. of Summ. J. Mot. [Doc. No. 36-1] at 14 (citing *Am. Wildlands v. Browner*, 260 F.3d 1192, 1197-98 (10th Cir. 2001) ("Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution"). Plaintiffs agree that Act 41 applies to a subset of nonpoint sources (on-lot septic systems), see Pls.' Br. at 8 ("[t]here is no disagreement that Act 41 . . . applies to nonpoint septic systems"), but argue that EPA must nonetheless review it because, in Plaintiffs' view, water quality standards apply to activities involving nonpoint source pollution. *Id.* at 4-5. However, water quality standards themselves do not apply to activities, as Plaintiffs suggest. Water quality standards define the water quality goals of a water body. See 40 C.F.R. § 131.2. Under the CWA, states are required to assess the quality of their waters and identify to EPA waters not meeting water quality standards, regardless of the source of the pollution or the activity causing the waters to be impaired.⁵ 33 U.S.C. §

⁴ The CWA "provides no direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task." *Pronsolino*, 291 F.3d at 1126-27; see e.g. 33 U.S.C. §§ 1311, 1362 (11), (12).

⁵ Pursuant to CWA section 303(d), states must identify to EPA a list of all impaired waters (including those impaired by nonpoint sources of pollution) and establish a "total maximum daily load" for those waters. 33 U.S.C. § 1313(d).

1313(d); *see Am. Farm Bureau Fed'n* 984 F. Supp. 2d. at 313. The CWA does not authorize EPA to regulate all activities that may impact the quality of a state's waters.

Furthermore, none of the cases cited by Plaintiffs establish that EPA has a duty under the CWA to review state laws regarding nonpoint source pollution. First, the U.S. Supreme Court's decision in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700 (1994) is not relevant, as it concerned the scope of *state* authority under a section of the CWA not at issue here, 33 U.S.C. § 1341. Nor do the various Pennsylvania Environmental Hearing Board cases cited by Plaintiffs further their argument, as those cases involve the Pennsylvania Department of Environmental Protection and Pennsylvania's Clean Streams Law, and do not address any EPA duties under the CWA.

Apparently recognizing EPA's lack of authority to directly regulate nonpoint sources of pollution, Plaintiffs argue that although Act 41 *applies* to nonpoint septic systems, it "regulates only those discharges of sewage from nonpoint septic systems that would adversely affect streams" and does not *regulate* nonpoint systems themselves. Pls.' Br. at 8. Plaintiffs reason that because Act 41 allegedly "*may* adversely affect water quality," the law itself should be deemed a revision of Pennsylvania's water quality standards. *Id.* (emphasis added). Plaintiffs' strained logic fails for two reasons. First, Act 41 *applies* to and *regulates* on-lot sewage systems by setting forth what on-lot sewage systems must do to comply with Pennsylvania's EPA-approved antidegradation policy (*i.e.*, specifies that those systems must be designed and approved in accordance with the Sewage Facilities Act and its regulations). Second, the CWA does not impose a general mandatory duty on EPA to review state laws or regulations that "may adversely affect" water quality. Indeed, such a subjective and abstract trigger of EPA review would be infeasible. Rather, as discussed above, CWA Section 303(c) only provides for EPA

review of “revised or new” water quality standards, period. 33 U.S.C. § 1313(c)(3). The CWA does not authorize EPA to review states’ requirements for nonpoint source controls, even if the pollution from such nonpoint sources may ultimately have an effect on water quality.

Plaintiffs continue to rely primarily on the decision in *Northwest Environmental Advocates v. EPA (NWEA)*, 855 F. Supp. 2d 1199 (D. Or. 2012) to support their argument that EPA has authority to regulate nonpoint source controls that may adversely affect water quality.⁶ Pls.’ Br. at 9-10. In its Motion to Dismiss and Motion for Summary Judgment, EPA set forth in detail why this Court should decline to follow the District of Oregon’s non-binding and non-persuasive decision in *NWEA*. See EPA’s Mem. of Law in Supp. of Summ. J. Mot. at 16-18. In *NWEA*, the court found that although the challenged nonpoint source regulations at issue were not themselves revised or new water quality standards, EPA was nonetheless required to review them because the regulations, in the court’s view, had “the potential to cripple the application of [Oregon’s water quality] standards.” *NWEA*, 855 F. Supp. 2d at 1211. The *NWEA* court’s holding placed EPA in the awkward position, depending on the outcome of its review, of

⁶ Plaintiffs also cite to two unpublished Southern District of Florida decisions, *Miccosukee Tribe of Indians of Florida v. United States*, No. 95-0533, 1998 WL 1805539 (S.D. Fla., Sep. 14, 1998) (*Miccosukee II*) and *Miccosukee Tribe of Indians of Florida v. United States*, No. 04-21448, 2008 WL 2967654 (S.D. Fla. Jul. 29, 2008) (*Miccosukee III*) to support their argument that EPA has authority to regulate nonpoint source controls affecting water quality. Pls.’ Br. at 11-12. However, contrary to Plaintiffs’ position, the court in *Miccosukee II* noted that “the CWA only allows EPA to directly enforce [water quality] standards against point sources.” 1998 WL 1805539, at *18. Both the *Miccosukee II* and *Miccosukee III* courts found that although EPA did not have direct authority under the CWA to enforce water quality standards against nonpoint sources, the CWA still applied to nonpoint sources. *Id.* (finding that a state regulation that allowed nonpoint sources to violate water quality standards violated the CWA); *Miccosukee III*, 2008 WL 2967654, at *20 n.33. EPA does not claim otherwise here. However, neither *Miccosukee II* nor *Miccosukee III* identified any CWA provision that requires EPA to review nonpoint source controls that may have an effect on water quality standards.

potentially having to directly regulate nonpoint sources in Oregon, despite having no authority under the CWA to do so. The Court should decline to follow the *NWEA* decision.

Evidently acknowledging that an order requiring EPA to promulgate regulations concerning nonpoint sources would conflict with the CWA, Plaintiffs now attempt to limit the relief they seek. Contrary to the relief requested in the Complaint (*see* Compl. Count 2), Plaintiffs now assert that they are only seeking that the Court order EPA to “deny Pennsylvania’s Act 41,” and thus, the remedy they seek would not require EPA to “promulgate new regulations for Pennsylvania.” Pls.’ Br. at 14. Plaintiffs misunderstand EPA’s mandatory review process under the CWA. If the Court were to find that Act 41 is a revised or new water quality standard subject to EPA review, EPA would be required to review Act 41 to determine whether it is consistent with the CWA’s requirements. *See* 33 U.S.C. § 1313(c)(3). If EPA found, as Plaintiffs assert, that Act 41 is inconsistent with the CWA’s requirements, then EPA would have to specify to Pennsylvania the changes needed to comply with the CWA’s requirements. *See id.* If Pennsylvania failed to make the changes specified by EPA within a set time frame, then EPA would have to promulgate the standards itself. *See id.* Thus, EPA review of Act 41 could very well lead to EPA regulation of on-lot sewage systems, which, as nonpoint sources of pollution, EPA is not authorized to regulate under the CWA.

III. Plaintiffs’ APA Claims Fail.

Plaintiffs are not entitled to summary judgment on their Administrative Procedure Act (“APA”) claims because they have failed to identify an applicable mandatory duty or discrete action that EPA was required to have undertaken. Plaintiffs incorrectly argue that even if EPA did not have a nondiscretionary duty (*i.e.*, was not required) to review Act 41, they are still entitled to summary judgment under the APA. Pls.’ Br. at 13. A claim under APA Section

706(1) can only proceed where “an agency failed to take a *discrete* agency action that it is *required* to take.” *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original). Moreover, even if the Court were to find that EPA had failed to take a required action, Plaintiffs are not entitled to summary judgment on their APA claims because they seek the same relief in the CWA claims. Judicial review under the APA is only available if “there is no adequate remedy in a court.” 5 U.S.C. § 704.

CONCLUSION

For the foregoing reasons, the Court does not have subject matter jurisdiction over any of Plaintiffs’ claims. EPA respectfully requests that the Court deny Plaintiffs’ Motion for Summary Judgment and either (a) grant EPA’s pending motion to dismiss, or (b) grant EPA’s motion for summary judgment.

Dated: October 28, 2014

Respectfully submitted,

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[PROPOSED] ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Upon consideration of Plaintiffs' Motion for Summary Judgment and all of the materials submitted in response thereto, it is hereby

ORDERED that Plaintiffs' Motion for Summary Judgment is DENIED; and it is further

ORDERED that Defendants' Motion for Summary Judgment is GRANTED.

Summary judgment is entered in favor of Defendants on all claims in Plaintiffs' Complaint.

Judgment shall be entered accordingly.

It is so ORDERED.

Dated: _____

The Honorable Edward G. Smith
United States District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 28, 2014, I filed on behalf of the United States Environmental Protection Agency, *et al.* the foregoing Brief in Opposition to Plaintiffs' Motion for Summary Judgment and Proposed Order with the Clerk of the Court electronically.

Accordingly, it is available for viewing and downloading from the ECF system. Service has been made electronically through the ECF system on the following counsel for Plaintiffs and Intervenor-Defendants:

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